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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 778

JOHN L. BISHOP, ET AL., PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. 13-20) is reported in 126 F. Supp. 449.

JURISDICTION

The judgment of the Court of Claims was entered on November 30, 1954. A timely petition for rehearing was denied on February 8, 1955. The petition for a writ of certiorari was filed on May 9, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the enforcement of valid regulations relating to the hunting of wild geese constitutes a taking of the property upon which the geese concentrate for which just compensation must be paid.

STATEMENT

Petitioners here seek review of a judgment dismissing their petition upon motion. The facts, as alleged in the petition, may be summarized as follows:

Treaties with Great Britain and Mexico providing for the preservation of migratory birds have been implemented by the Migratory Bird Treaty Act of July 3, 1918, 40 Stat. 755, as amended by the Act of June 20, 1936, 49 Stat. 1555, 16 U.S.C. 703, 704. Presidential Proclamations governing the hunting of wild geese, particularly the open season, are issued annually. This was done in 1947 by Proclamation 2739 providing an open season in Illinois from November 4 to December 3, 1947. In October of that year Proclamation 2748 was issued prohibiting hunting of wild geese at any time in an area surrounding Horseshoe Lake Preserve, a wild bird sanctuary established and owned by the State of Illinois. The appropriate state authorities took similar action, and the prohibition has been continued in subsequent years.

Petitioners own or lease farms within the closed area. They sought recovery on two theories. Count I asserted that there had been a taking of petitioners' "hunting businesses" or of petitioners'

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"right to hunt wild geese" (Pet. 6-7). Count II claimed that the geese which had concentrated in the closed area ate petitioners' corn and other crops, that government agents took affirmative steps to insure such concentration and to prevent molestation or removal of any geese, and that these acts "operated to impose a servitude upon the lands and crops involved herein" (Pet. 9). The Court of Claims dismissed the petition, holding that neither count stated a cause of action. Judge Madden dissented as to the second count (Pet. 20).

ARGUMENT

1. In *Lansden* v. *Hart*, 168 F. 2d 409 (C.A. 7), certiorari denied, 335 U.S. 858, and *Lansden* v. *Hart*, 180 F. 2d 679 (C.A. 7), certiorari denied, 340 U.S. 824, attempts of petitioners here to enjoin enforcement of Proclamation 2748 were rejected, the court holding, *inter alia*, that this Proclamation and the companion state proclamation were valid.[1] Under the Migratory Bird Treaty Act as amended, 16 U.S.C. 703, hunting of migratory birds is prohibited "Unless and except as permitted by regulation." It follows that the claim asserted by petitioners in count I lacks merit because they have no right to hunt wild geese or to conduct a business of hunting geese in the area in question. Moreover, as the Court of Claims stated (Pet. 16), "No citizen has a right to hunt wild game except as per-

[1] An attempt to recover damages under the Tort Claims Act was also rejected in *Sickman* v. *United States*, 184 F. 2d 616 (C.A. 7), certiorari denied, 341 U.S. 939.

mitted by the State." The more recent cases cited by petitioners (Pet. 11) do not overrule *Geer* v. *Connecticut*, 161 U.S. 519, in this regard nor do they indicate the existence of private rights in *ferae naturae*.

2. Petitioners' alternate theory, that a servitude has been imposed upon their land and crops, likewise ignores the governmental authority over migratory birds and other *ferae naturae*. There has not been an assertion of any rights in petitioners' lands or of any control over them, but merely a prohibition against hunting geese. In essence petitioners' argument is based upon a refusal to recognize that the authority to control migratory birds includes the power to forbid the hunting of them anywhere, including petitioners' farms. The alleged "depredations" of the geese in eating corn or other crops is simply an incidental consequence of enforcement of the proclamation which is no different from the similar results which follow where protection is given to many wild animals such as deer, moose, mink, etc. (see Pet. 18-19). Far from presenting any new or important question, this is merely another instance of incidental damage resulting from authorized regulations. The suggestion of the dissenting judge that if the damages are sufficiently severe a taking has occurred (Pet. 20) fails to recognize the fundamental difference between appropriation of property and restrictions upon its use flowing from valid regulations. For example, prohibition regulations may render a brewery substantially useless, but there

is no taking under the Fifth or Fourteenth Amendment. *Mugler* v. *Kansas*, 123 U.S. 623, 664-670; *Hamilton* v. *Kentucky Distilleries Co.*, 251 U.S. 146, 156-157. Certainly the authority over migratory birds is not so limited that enforcement of the regulations in areas where it is most important, *i.e.*, where the birds congregate, can be accomplished only by acquiring the lands in the vicinity.

CONCLUSION

The decision below is correct and there is no conflict. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY, 1955.

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